

TESTIMONY OF

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ON Y2K

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE

AND TRANSPORTATION

UNITED STATES SENATE

February 9, 1999

Mr. Chairman, distinguished Senators, thank you for the opportunity to address your committee on this very important issue. I speak to you today not only from the viewpoint of an attorney but also from the perspective of a small-businessman who identifies with both the civil justice system and the concerns of small businesses in America. My law practice encompasses not only the representation of those who may be killed or injured as a result of Y2K misfortunes but also representation of responsible business leaders who are now confronted with litigating against business leaders who are less responsible. This type of business versus business litigation will be the hallmark of Y2K.

Y2K is not a partisan political issue. It affects all of us: citizens, businesspeople, and consumers. We may see our lives materially altered by its impact.

It is not how we register at the polls that is important but rather how responsibly we act as individuals.

It is not which party we support that is important, but rather the integrity which we demonstrate as we run our businesses.

It is not how we vote that matters, but our willingness to accept accountability for our own actions.

The Y2K issue should have nothing to do with politics and everything to do with all of us working together to encourage and support responsible business practices.

Each of us, individual and business alike, is confronted with three potential problem areas arising out of Y2K. First, we are all reliant upon those who maintain our infrastructure to provide such essential commodities as electricity, clean water, and an abundant food supply. Secondly, each of us has to confront Y2K as it affects our individual lives and businesses. Each business leader must take the actions necessary to conform to the business judgment rule and to exercise the duty of due care owed to both their businesses and their customers. Finally, in modern America, we are very reliant upon the business integrity of our vendors, manufacturers, and other businesses upon whom we depend. These business relationships are controlled by well-established principles of business law which have worked very effectively to make America the most productive, most efficient and most successful business community in history. Responsible business leaders have followed these time-honored business principles in addressing the Y2K problem and it would seem unseemly to change the rules at this late date.

Those who would change these business rules argue that there is a crisis. If a crisis exists, it is a crisis of responsible business leadership and a crisis of corporate accountability. If mishandled, it could create a crisis of confidence in the American public. It is respectfully submitted that if this Congress passes legislation on the basis that a "computer crisis" exists, the media coverage of such an event could lead the American public to the conclusion that they

should question their own reliability on the computers in their banks. A loss of confidence in our computer-laden banking system could lead to a run on the banks, which would create a true crisis.

This is not a computer crisis. The Y2K "bug" is not a computer glitch. A glitch is a malfunction in a product which causes it to fail to perform in the manner in which it was designed. The Year 2000 computer problem, which arises out of the use of a six-digit rather than an eight-digit date field, was designed in that manner by early computer programmers for the purpose of saving space and, therefore, money in their programs. The programmers did not anticipate that the programs which they were designing forty and fifty years ago would still be in use on January 1, 2000. While that oversight may be forgiven, we cannot forgive the fact that America's marketplace is filled with products which are being manufactured and marketed today by companies which continue to ignore the Year 2000 problem and which will not be Y2K compliant. Manufacturers of products which were marketed as recently as 1997 are now seeking to charge exorbitant prices for "Y2K upgrades" to correct the Year 2000 problem - a problem which they intentionally designed into their products long after they were aware of the Year 2000 problem. Multitudes of businesses, both large and small, are now confronted with paying the cost of upgrades or replacing their equipment on January 1, 2000. Almost all of the class actions which are currently on file arising out of Y2K issues are predicated on this scenario.

The Year 2000 problem has revealed two types of corporate leaders in America. Fortunately, there is a very large contingent of responsible corporate leaders who followed the law, exercised their discretion within the parameters of sound business judgment, and met the duty of due care to their companies and its customers. By following this business law, which has been finely honed over centuries of business experience, these responsible leaders confronted the problem of Y2K and will be internally prepared for what January 1, 2000, may bring. These business leaders ask that their rights and remedies under existing law not be changed at this late stage of the game. The rules were there, they followed them, they met their obligations, and now they seek to retain their rights.

Unfortunately, there is another group of business leaders in this country who procrastinated against the inevitable arrival of January 1, 2000; who acted irresponsibly by failing and refusing to address the Y2K problems of their companies, and who failed to follow the business judgment rule and to exercise due care for the benefit of their companies and their customers, as required by law.

Instead of accepting the consequences of their own irresponsible actions, these business leaders now ask this distinguished body for what amounts to "corporate welfare. " The cry of those who ignored the long-established rules of business is:

"Don't impose those rules upon us, don't hold us accountable, simply change the law and grant us immunity from our own irresponsibility."

The bill before this Honorable Senate, unfortunately, responds to the latter group of business leaders – the procrastinators, the irresponsible, and those who seek to avoid accountability for their irresponsible actions.

It seems appropriate to inquire how a grant of immunity to procrastinators and irresponsible business leaders who seek to avoid accountability for their own bad business judgment would solve the Y2K problem. Those who are seeking this corporate welfare are business leaders who have known of impending Y2K problems for years and who have wilfully failed and refused to act responsibly, even in the face of potential liability. How can a grant of immunity from such liability motivate such leaders to suddenly act responsibly, function within the business judgment rule, and meet their duty of due care? It is respectfully submitted that a Senate seal of approval on procrastination and corporate irresponsibility will only beget more of the same from such leaders.

An essential point of Y2K litigation is that it will primarily be business suing business. Effectively, it will be businesses which acted responsibly suing businesses which acted irresponsibly. A major problem with the proposed legislation is that it not only grants immunity to the irresponsible but also abrogates the rights of the responsible corporate business leaders who acted within the law, who exercised reasonable business judgment, and who met their duty of due

care to their corporations and their customers. The proposed legislation changes the rules of the game as the end of the fourth quarter approaches and passes new rules to reward the irresponsible while punishing the responsible business leaders.

It is respectfully submitted that changing the law which controls the actions of corporate leaders within our civil justice system in order to reward the irresponsible while denying recovery to the responsible sends the wrong message to the business community, the wrong message to the public, and the wrong message to the voters.

How does an elected official reply to a constituent who confronts you with the following scenario:

I am a businessman in your district. Like a lot of businesses, I faced major Y2K problems. I was amazed to learn that it would cost more than \$1,000,000.00 to solve the problems. It was difficult, but my Board of Directors backed me in acting responsibly. We knew the law. We knew that we had to exercise due care for the corporation. We knew that we had to meet the business judgment rule. We knew that we wanted to be in business on January 1, 2000, and we also knew that our customers were relying on us to act responsibly. So we cut dividends. We poured profits back into remediation. We borrowed money from the bank. We solved our Y2K problems.

I now learn that despite our efforts we are facing bankruptcy. Our vendors, unknown to us, failed to act responsibly. They did not make the Y2K corrections in the components which they supplied to us.

When I learned this, I told my Board, 'Don't worry, we can file suit against them. We're still okay financially.'

I am here today because my lawyer, to my amazement, tells me that I can't sue them. That even if I could recover, there is a limited amount of damages available to me. That we have no choice but to file for bankruptcy. My lawyer also tells me that you supported this legislation. So I am here to ask you why. Why would you support legislation which protects the irresponsible while punishing a responsible constituent company such as mine?

As I said at the inception, the Y2K is not a partisan, political issue. It will cut across party lines and most of the litigation arising out of it will be business versus business. The business

community in America has the right to rely upon the continuation of the time-honored principles of law under which they have responsibly approached the Y2K problem. Those who have failed to follow the laws controlling business should be held accountable under our civil justice system. We don't need special tribunals: we don't need instant immunity for irresponsible corporate behavior. The courts, the common law and statutes in this country, as they exist today, are fully capable of resolving all issues under Y2K. We respectfully submit that S. 96, as drafted, should be rejected by this Honorable Body. Thank you for the opportunity to be heard on this vital issue.

